

Award No. 3358

Docket No. CL-3355

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that The Ogden Union Railway and Depot Company and/or its officers violated the terms of the existing agreement, to-wit:

(a) By dismissing Mr. C. L. Carey, Storekeeper for the Ogden Union Railway and Depot Company, from the service of the Company at 9:00 A. M. Saturday, October 20, 1945; and

(b) The Company shall now be required to restore Mr. Carey to his former position of Storekeeper with the company and shall compensate him for all time lost as a result of this dismissal.

OPINION OF BOARD: The Claimant, C. L. Carey, was employed by the Carrier on September 22, 1912, and on April 23, 1945, he bid in and was assigned the position of Storekeeper. By letter dated October 19, 1945, the Superintendent instructed him to report for investigation in connection with his absence from duty without permission from Noon, October 18, to October 19, 1945. At the investigation the Claimant acknowledged he did not work the afternoon of October 18th nor any of October 19th; nor did he notify his employer of that fact. He stated he was sick on those days. The Superintendent then asked questions relative to the condition of the Store, and on objections by General Chairman that such questions were not proper, the investigation was continued until 10:00 A. M., October 22nd. In a new letter dated October 20, 1945, the Superintendent instructed the Claimant to report at 10:00 A. M. of October 22nd in connection with conditions existing in the Stores Department and his absence from duty many times, particularly the afternoon of October 18, 1945. The General Chairman notified the Superintendent that because the notice did not conform to Rule 30, Claimant would not appear. Among other things, that rule provides:

"At a reasonable time prior to the hearing, the employe shall be apprised of the precise charge against him; in case of unsatisfactory service or incompetency all charges to be investigated shall be stated * * *."

Then on October 22, 1945, by letter, the Superintendent instructed the Claimant to report for investigation at 10:00 A. M., October 24, 1945 on five charges. Briefly, the charges were:

1. Absence from duty without permission on July 24, 25, 26, 1945; August 23, 1945; October 13, 1945, and from Noon, October 18th to and including October 19, 1945.

2. Failure to have your absence reported on pay roll and instructing your clerk to show you as being present on the days you were away.

3. Neglect of duty.

4. Absence from duty without permission during hours of assignment.

5. Reporting late for duty.

On October 25, 1945, the Superintendent advised the Claimant by letter that he was dismissed from service for absenting himself without permission on the dates stated in his letter of October 22, 1945, and for instructing his clerk to show him on the pay roll as having worked on the days he was absent and for submitting falsified pay rolls.

It is evident from this letter that the Carrier found the charges Nos. 1 and 2 had been sustained, but made no finding on charges Nos. 3, 4 and 5. Therefore, as to these last three charges, it is evident these charges were not sustained. We will, therefore, only review the evidence on the first two charges.

This Division is committed to the view that it is not a proper function of this Board to weigh the evidence, for if the evidence is substantial and supports the charges made, the findings of the carrier with reference thereto will not be disturbed.

At the hearing on October 24, 1945, the Claimant admitted that he was absent on the dates charged and, also, that he instructed his clerk to show him as working on days he was absent and for submitting falsified pay rolls. However, Claimant contends that he was sick on the dates in question and it has been the practice to show an employe working when he was sick only two or three days.

Rule 35 grants sick leave without loss of pay under certain conditions. This evidence was substantial and sufficient to sustain charges 1 and 2. But the Petitioner contends that the Carrier acted capriciously and arbitrarily in conducting the hearing. First, the Petitioner contends that after the first notice had been given Claimant, the Carrier had no right to give the second and third notices, since there was no decision made as to the first hearing, this Board does not agree with the Petitioner. Nothing was adjudicated at this hearing. The General Chairman made objections to the second notice because it did not comply with Rule 30, and was sustained. This resulted in the third notice on which Claimant was tried. We see nothing unfair under these circumstances. The last two notices were in effect amendments of the first hearing, and a decision was reached only after a hearing on the third notice.

Petitioner says that it was unfair to have a decision rendered before the evidence was transcribed. The Superintendent heard the evidence and since the Claimant admitted the first two charges, the Claimant was not prejudiced. Nor do we find anything unfair regarding the appeal. The Vice President approved the action of the Superintendent. It is true the Vice President said in his letter to the General Chairman dated November 15, 1945, that—

"I would say his record should be closed out permanently except for his possible length of service.

"If Superintendent Edens is inclined to return him to service on a leniency basis, that would have my approval, with the distinct understanding he will not again be used as storekeeper."

As we read this letter, it was not a conditional approval of the action of the Superintendent, but an absolute approval. He does suggest that Claimant

could be reinstated on certain conditions, solely on a leniency basis, conditionally upon the approval of Edens. This, Edens would not do except upon conditions that were not acceptable to the Claimant.

Since Claimant had spent thirty-three years in the service of the Carrier and the greater share of his life in railroading, the chances are that he is familiar with not other trade or profession. Dismissal from the service is very harsh punishment.

We realize the problems with which a carrier must contend in maintaining discipline among its employes, and where the guilt of an employe has been established this Board will not ordinarily interfere with the discipline meted out. But the dismissal from service here imposed is out of proportion to the offense. In view of Claimant's long length of service, we cannot agree that the Carrier was acting within the maximum limits of a reasonable exercise of discretion when it dismissed Claimant from the service. We realize the gravity of the offense of falsifying a pay roll record, yet we think that if Claimant is restored to his seniority rights, and with no compensation allowed for the time lost, he will be sufficiently punished. However, we do not think that he should be restored to the former position as Storekeeper. We, therefore, direct that Claimant be restored his seniority rights, but not to the position of Storekeeper, and there shall be no award for compensation lost while Claimant was withheld from service.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Claimant was properly found guilty of charges one and two; that the penalty imposed was excessive, it not being commensurate with the nature of the offense under the facts as disclosed in the record.

• AWARD

That the Claimant will be restored with all seniority rights restored, but not to the position of Storekeeper, and with no award for compensation for the time held out of service.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. H. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of December, 1946.